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BINDING ARBITRATION OF EMPLOYMENT DISPUTES: 2002

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I. INTRODUCTION

In the 1991 case of *Gilmer v. Interstate/Johnson Lane Corp.*[1] the U. S. Supreme Court held that stockbroker Robert Gilmer's lawsuit under the Age Discrimination in Employment Act (ADEA) against his former employer could be stayed under the Federal Arbitration Act (FAA), and that he could be compelled to arbitrate his statutory ADEA claim under the FAA rather than pursue his case in a federal court. Gilmer's registration form with the New York Stock Exchange contained an agreement to arbitrate any controversy arising out of his employment with or termination by a member firm.[2] The Court enforced this broad mandatory arbitration clause even though it deprived Gilmer of his judicial remedy, concluding that Congress did not explicitly preclude arbitration of ADEA claims.[3] As a result of the *Gilmer* decision many employers have required their non-union employees to agree to broad arbitration clauses as a condition of employment, often inserting such clauses in employee handbooks with due notification to affected employees. New employees at all salary levels are commonly required to sign such pre-dispute, broad mandatory arbitration clauses on a take-

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[1] 500 U.S. 20 (1991).

[2] *Id.* at 23.

[3] *Id.* at 35.

it-or-leave basis.[4] The plaintiff bar has challenged these so called "*Gilmer*" arbitration clauses on various grounds with very limited success.[5] A strong challenge was initiated on the theory that the Federal Arbitration Act of 1925 was intended to compel judicial enforcement of arbitration agreements governing commercial disputes and was not intended to apply to employment contracts. The Ninth Circuit Court of Appeals had accepted this position in post-*Gilmer* litigation.[6] However, in *Circuit City Stores Inc. v. Adams*,[7] decided on March 21, 2001, the U. S. Supreme Court rejected the Ninth Circuit's interpretation of the FAA in a 5-4 decision and reversed and remanded the case to the court of appeals.[8] The *Circuit City* decision is fully presented in this paper and its impact is discussed. Post-*Circuit City* decisions are then analyzed to ascertain emerging theories of the plaintiff bar's continuing quest to avoid relegation of statutory employment claims to arbitration. Recommendations are proposed to make the arbitration process more acceptable to employees and their representatives, and to reduce the number of court challenges to the arbitration process.

II. THE *CIRCUIT CITY* DECISION

The relevant facts in *Circuit City* reveal that Saint Clair Adams applied for a job as a computer salesman at Circuit City's Santa Rosa California store. He signed an employment application which included the following provision:

> I agree that I will settle any and all previously unasserted claims, disputes or controversies arising out of or relating to my application or candidacy for employment, employment and/or cessation of employment with Circuit City, *exclusively* by final and binding *arbitration* before a neutral arbitrator. By way of example only, such claims include claims under federal, state, and local statutory or common law,

[4] Contrast these employer devised and imposed arbitration procedures with grievance-arbitration procedures mutually negotiated by unions and employers and individual employees may well have more overall confidence in the fairness of the later process.

[5] *See infra* notes 57 through 67.

[6] Proponents of this position rely on the language of Section 2 of the FAA which makes enforceable written agreements to arbitrate "in any maritime transaction or contract involving commerce." 9 U.S.C. §2. And they believe that the legislative history of the Act shows that it was intended to apply only to commercial and maritime contracts; while no legislative history exists to show that the proponents of the legislation intended it to apply to agreements affecting employment. Proponents point out that the Secretary of Commerce, Herbert Hoover, proposed the "but nothing herein shall apply to seamen or any class of workers in the interstate and foreign commerce" to allay the fears of a maritime union. Joint Hearing on S. 1005 and H.R. 646, 68th Cong. 1st Sess. 14 (1924).

[7] 121 S. Ct. 1302 (2001).

[8] *Circuit City*, 121 S. Ct. at 1306.

> such as the Age Discrimination in Employment Act, Title VII of the Civil Rights Act of 1964, as amended, including the amendments of the Civil Rights Act of 1991, the Americans with Disabilities Act, the law of contract and the law of tort. App. 13 (emphasis in original).[9]

Adams was hired. Two years later he filed a discrimination law suit against Circuit City in state court. Circuit City filed suit in federal court under the Federal Arbitration Act (FAA) of 1925 seeking to enjoin the state court action and to compel arbitration.[10] The Ninth Circuit Court of Appeals determined that this "contract of employment" was not subject to the FAA. Noting that the Ninth Circuit's ruling was in conflict with every other court of appeals to have addressed the issue, the company appealed the decision to the U. S. Supreme Court, which granted *certiorari* to resolve the conflict.[11] Both the majority and the dissent in this 5-4 decision focused on the language of Sections 1 and 2 of the FAA. Section 2 sets forth the basic coverage of the Act, as follows:

> (a) written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.[12]

Section 1 of the Act provides an exemption clause from coverage of the Act, stating in part that the Act shall not apply "...to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."[13] The dissent believed that the legislative history showed that no exemptions for labor contracts was contained in the original draft because no one had contemplated that Section 2's reference to "a transaction involving commerce" could apply to a labor contract.[14] But to allay the fears of a maritime union, then Secretary of Commerce, Herbert Hoover, proposed that language might be added to the pending bill, which would state "... but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged interstate state or foreign commerce."[15] Since this very language

[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] 9 U.S.C. §2.
[13] 9 U.S.C. §1.
[14] *Id.* at 1314 (Stevens, J., dissenting).
[15] *Id.* at 1315 (Stevens, J., dissenting).

became the exclusion language of Section 1 of the enacted legislation, the dissent reasoned that it is not "pointless to adopt a clarifying amendment in order to eliminate opposition to a bill."[16]

The majority opinion, written by Mr. Justice Kennedy, rejected the dissenting opinion, reasoning that if all contracts of employment were in fact exempt from the coverage of the FAA, as argued on behalf of Mr. Adams, then there would be no need for the specific exemption language set forth in Section 1, making such language superfluous.[17] Moreover, the Court majority relied on the doctrine of statutory construction—*ejusdem generis*—meaning that where general words are followed by an enumeration of specific terms, the general terms will be interpreted to include or cover only things of the same general nature or class as those enumerated. Thus, the general phrase "any other class of worker engaged in...interstate commerce" refers only to seamen, railroad or transportation workers.[18] Saint Clair Adams, a computer salesman, accordingly does not come within the scope of this exemption.

Justice Kennedy's majority opinion was mindful of the Court's previous precedents, stating that a variable standard for interpreting common jurisdictional phrases [depending on the meaning of the phrases at the time of enactment] would contradict the Court's earlier cases and bring instability to statutory interpretation.[19] The Court was apparently mindful of its *Gilmer v. Interstate/Johnson Lane Corp.* decision, which enforced the arbitration of an ADEA claim under the Federal Arbitration Act.[20] Acceptance of the position argued on behalf of Mr. Adams, which asserted that all contracts of employment were exempt from the coverage of the FAA, would be inconsistent with the Court's *Gilmer* decision.

The Court rejected the supposition that the advantages of the arbitration process somehow disappear when transferred to the employment context,[21] and the Court points out that arbitration agreements allow parties to avoid the costs of litigation.[22] Relying on its *Gilmer* precedent, the Court made clear that in agreeing to arbitration of a statutory claim, a party does not forego substantive rights afforded by the statute.[23]

[16] *Id.* at 1316 (Stevens, J., dissenting).
[17] *Id.* at 1311.
[18] *Id.* at 1309.
[19] *Id.* at 1310.
[20] *Gilmer*, 500 U.S. at 24-26.
[21] *Circuit City,* 121 S. Ct. at 1313.
[22] *Id.*
[23] *Id.*

III. POST-*CIRCUIT CITY* LITIGATION

With the *Circuit City* decision broadly applying to all employment contracts except transportation workers covered under Section 1 of the FAA, from an employer's perspective a major obstacle to the mandatory arbitration of statutory employment discrimination claims had been eliminated. The *Circuit City* Court did emphasize, relying on the *Gilmer* decision, that by agreeing to arbitration of statutory claims an employee does not forego substantive rights afforded by statute; the employee only submits to their resolution in an arbitral rather than a judicial forum.[24] However, most mandatory arbitration clauses are unilaterally developed and promulgated by employers, and they are presented to employees on a take-it-or leave it basis, for continuing or new employment.[25] Employers commonly exercise some flexibility in negotiating salaries and certain benefits, but they generally are adamant that any future employment disputes be resolved through arbitration and not in the courts.[26] However, employers are not free to impose unconscionable arbitration agreements on employees.[27] The *Gilmer-Circuit City* guarantees securing employees' statutory rights require procedural and remedial protection so that claimants can effectively pursue their statutory rights.[28]

On remand from the U.S. Supreme Court, the Ninth Circuit Court of Appeals *in Circuit City II*[29] considered whether the district court originally erred in exercising its authority under Section 2 of the FAA to compel arbitration. The Court of Appeals set out to examine the validity of the arbitration agreement, applying "ordinary state law principles that govern the formation of contracts";[30] and the Court pointed out that general contract defenses such as fraud, duress or unconscionability, grounded in state contract law, may operate to invalidate arbitration agreements.[31] Applying California contract law the Court determined that the Circuit City Dispute Resolution Agree-

[24] *Circuit City*, 121 S. Ct. at 1313.

[25] On remand of the *Circuit City* case to the Ninth Circuit (*Circuit City II*), the Court referred to the arbitration agreement Circuit City had devised as a "thumb on the employer's side of the scale." The agreement in question was unilaterally developed and had to be accepted by the applicant to obtain employment. Daily Labor Rep. (BNA) No. 25, at E-1 (Feb 6, 2002).

[26] For example, in Mercuro v. Superior Court of Los Angeles County, a stockbroker was told by his employer, Countrywide Securities Corp., that he "did not have the option of not signing the [arbitration] agreement." Daily Lab. Rep. (BNA) No. 35, at E-2 (Feb. 21, 2002).

[27] *Circuit City II*, Daily Lab. Rep. No. 25 at E-2.

[28] *Circuit City*, 121 S. Ct. at 1313.

[29] Daily Lab. Rep. (BNA) No. 25, E-1 (Feb. 6 2002).

[30] *Id.* at E-2, citing First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944 (1995).

[31] *Id.* citing Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996).

ment (DRA) was procedurally unconscionable because it was a contract of adhesion—a standard-form contract drafted by the party with superior bargaining power, which relegates the other party to take the contract or leave it.[32] The Court also found that the DRA was substantively unconscionable. Under the DRA employees must arbitrate "any and all employment related claims..." while Circuit City is not obligated to arbitrate their claims against employees, thus depriving the DRA of any modicum of bilatorality.[33] Moreover, the remedies are limited under the DRA, including a one year back pay limit and a two year front pay limit, with a cap on punitive damages of an amount up to the greater of the amount of back pay and front pay awarded or $5,000.[34] By contrast in a civil lawsuit under state law a plaintiff is entitled to all forms of relief.[35] A further reason for its finding of substantive unconscionability was the DRA's requirement that the employee split the cost of the arbitrator's fees with the employer.[36]

The Court of Appeals in *Circuit City II* also analyzed the DRA from the perspective of the *Gilmer* guarantee that the arbitral forum allowed the employee to effectively pursue statutory rights.[37] Under this *Gilmer* analysis the Court concluded that the DRA failed (1) to provide all of the types of relief that would otherwise be available in court; and (2) failed to ensure that the employee did not have to pay unreasonable arbitration costs or fees or expenses as a condition of access to the arbitration forum.[38] While the Court recognized that under state law it had discretion to sever the unconscionable provisions and order arbitration, it rejected this option because the unconscionable provisions pervaded the entire contract.[39] Accordingly, the Court of Appeals reversed the district court's order compelling arbitration.[40]

In *Mercuro v. Superior Court of Los Angeles County (Countrywide Securities Corp)*,[41] the California Court of Appeals reversed a state trial court's decision to enforce an arbitration agreement between a stockbroker, Fred Mercuro and Countrywide Securities Corporation. The Court held that Countrywide's arbitration agreement was procedurally and substantively unconscionable.[42] The Court determined that the

[32] *Id.*
[33] *Id.*
[34] *Id.* at E-2 and E-3.
[35] *Id.*
[36] *Id.*
[37] *Id. Gilmer*, 500 U.S. at 28.
[38] *Circuit City II*, Daily Lab. Rep. No. 25 at E-3.
[39] *Id.*
[40] *Id.*
[41] Daily Lab. Rep. (BNA) No. 35, at E-1 (Feb 21, 2002).
[42] *Id.* at E-4.

agreement was a contract of adhesion drafted by the stronger party and signed on a take-it-or-leave it basis, with the employee being told by upper management that he "did not have the option of not signing the agreement" if he wanted "to make a living at Countrywide."[43] The agreement was found to be substantively unconscionable, because under the agreement the arbitrator is selected by the National Arbitration Forum (NAF) and the weaker party thus has no participation in the selection of the arbitrator.[44] Moreover, with just eight NAF arbitrators available in the district and the dominant size of Countrywide, the employer will have more repeat exposure to these few arbitrators and will have a "repeat player effect" advantage over an individual employee, where the arbitrator might cultivate further business by taking a "split the difference" approach to damages.[45] The agreement was also found to be substantively unconscionable for lack of mutuality because employees were required to arbitrate most claims of interest to employees while most claims of interest for Countrywide were exempted.[46] The Court, seeing a systematic effort to impose "an inferior forum that works to the employer's advantage," determined that it could not sever the offending provisions of the Arbitration Agreement because nothing of substance was left to the contract.[47] It thus vacated the order compelling arbitration and allowed Mercuro to proceed with his employment discrimination lawsuit.[48]

In *Blair v. Scott Specialty Gases, Inc.*[49] the Third Circuit Court of Appeals dealt with the effect of a provision in an arbitration agreement requiring an employee to pay one-half of the arbitrator's fees. Diane Blair's Title VII sexual harassment suit was dismissed under the Federal Arbitration Act by a U. S. district court, and the parties were directed to arbitrate the claims under the terms of their arbitration agreement.[50] On appeal, Blair argued that the agreement was unenforceable because of the fee-splitting provision.[51] The Court of Appeals took guidance from the U. S. Supreme Court's decision in *Green Tree Financial Corp.-Alabama v. Randolph,*[52] a non-employment dispute involving alleged violations of federal lending statutes and an arbitration agreement, requiring disputes between the parties be resolved

[43] *Id.* at E-3.
[44] *Id.* at E-4.
[45] *Id.* at E-3 and E-4.
[46] *Id.*
[47] *Id.* at E-6.
[48] *Id.* at E-8.
[49] Daily Lab. Rep. (BNA) No. 52, at E-1 (Mar. 18, 2002).
[50] *Id.*
[51] *Id.*
[52] 531 U.S. 79 (2000).

through arbitration. The *Green Tree* Court stated that the existence of large arbitration costs could preclude a litigant from effectively vindicating federal statutory rights in an arbitral forum.[53] Based on the *Green Tree* formula, the Third Circuit determined that the case should be remanded to the district court on the issue of arbitrator's fees, with the claimant having the initial burden to come forward with some evidence to show that projected fees would be prohibitively expensive, and with an eventual burden shift to the party seeking arbitration to come forward with contrary evidence.[54] The court of appeals explained that Blair has limited discovery rights into the rates charged and cost of arbitration, such that the cost would deny her a forum to vindicate her statutory rights, with the burden shifting to the company to prove arbitration will not be prohibitively expensive; or the company may offer to pay all of the arbitrator's fees.[55]

As set forth in *Circuit City II*, state law provisions that govern the formation of contracts apply when considering whether a mandatory arbitration provision applies; and contractual defenses may operate to invalidate such mandatory arbitration provisions.[56] Moreover, the

[53] *Id.* at 90.

[54] *Blair*, Daily Lab. Rep. No. 52 at E-7. In Cole v. Burns International Security Services, 105 F.3d 1465 (D.C. Cir. 1997), the Court wrote,

"[W]e are unaware of any situation in American jurisprudence in which a beneficiary of a federal statute has been required to pay for the services of the judge assigned to hear her or his case. Under Gilmer, arbitration is supposed to be a reasonable substitute for a judicial forum. Therefore, it would undermine Congress's intent to prevent employees who are seeking to vindicate statutory rights from gaining access to a judicial forum and then require them to pay for the services of an arbitrator when they would never be required to pay for a judge in court." *Id.* at 1484. The *Cole* Court held that where arbitration has been imposed by the employer, the employer may not require the employee to pay all or part of the arbitrator's fees in order to pursue statutory claims under Title VII. *Id.* at 1484-85. The parties in *Cole* had stipulated that arbitrator's fees vary between $500 to $1000 or more per day. *Id.* at 1480 & n.8 (citing several articles regarding the cost of arbitration). In *Cole*, the arbtration agreement was silent on the allocation of the arbitrator's fees between the parties, and the Court concluded that the employer alone must pay. *Id.* at 1481. The opinion does not indicate whether the Court had specific proof of the claimant's financial position but does note that the job from which Cole was fired was that of a security guard. *Id.* at 1469, and that "[t]hese fees would be prohibitively expensive for an employee like Cole, especially after being fired from his job." *Id.* at 1484.

In Klinedinst v. Tiger Dylac, U.S.A., Inc. 2001 WL 1561821 (Nov. 28, 2001) the U. S. District Court for the district of New Hampshire noted that *Cole* which predates *Green Tree*, could have been adopted by the Supreme Court in the *Green Tree* decision; but it was not. This Court refused to adopt a *per se* rule against arbitration clauses that require employees to pay part of an arbitrator's fee, and followed the *Green Tree* approach set forth in the text.

[55] *Blair*, Daily Lab. Rep. No. 52 at E-8.

[56] *Circuit City II*, Daily Lab. Rep. No. 25 at E-2.

Gilmer guarantee that the arbitral forum allow the employee to effectively pursue her or his statutory rights is always considered by the court. A review of decisions issued after the Supreme Court's *Circuit City* decision indicates that employers with reasonably balanced arbitration agreements are generally successful in withstanding employee challenges to the arbitration agreements based on contract law theories and defenses and "loss of statutory rights" theories. Rejected claimant arguments in post-*Circuit City* litigation include "no offer and acceptance";[57] "not bargained for";[58] no consideration;[59] unconscionability;[60] time limits;[61] waiver;[62] coercion;[63] loss of statutory rights;[64] limited remedies;[65] lack of discovery;[66] and fee-splitting.[67]

IV. CONCLUSION: RECOGNIZING THE MUTUAL ADVANTAGE TO EMPLOYERS AND EMPLOYEES OF A FAIR ARBITRATION PROCESS AND SOME SUGGESTED ELEMENTS FOR A FAIR ARBITRATION AGREEMENT

The *Gilmer* decision, broadened by the Supreme Court's *Circuit City* decision, makes it clear and certain that arbitration is an acceptable forum for the resolution of employment disputes between employees and their employers, including employment related claims under federal and state statutes. However, since the controlling arbitration agreement language is commonly unilaterally devised and implemented by the employer, claimant-employees may be skeptical of this employer-initiated forum—especially if the claimants believe they were unfairly terminated or deprived of a job promotion or benefits by the employer and they are relegated to a forum favored by the employer. Moreover, when plaintiff attorneys explain the arbitration process to clients, the clients may be told that they do not have a right to present their case to

[57] Adkins v. Labor Ready, Inc., 2001 WL 1782607 (S.D. W.Va. Sept. 28, 2001).

[58] *Id.* at *4.

[59] *Id.* at *4 *See also* Tupper v. Bally Total Fitness Holding Corp. 2001 WL 334500 (E.D. Wis. Feb. 27, 2002).

[60] Klinedinst v. Tiger Dylac, U.S.A., Inc. 2001 WL 1561821 (D.N.H. Nov. 28, 2001). *Adkins,* 2001 WL 1782607, at *6. Poole v. L. S. Holding, Inc. 2001 WL 1223748 (Virgin Isl. Aug. 20, 2001).

[61] *Tupper,* 2001 WL 334500, at *8.

[62] MicroStrategy Inc. v. Lauricia, 268 F.3d 244 (4th Cir. 2001); *Klinedinst,* 2001 WL 1561821 at *6.

[63] *Id. See also Tupper,* 2001 WL 334500, at *1.

[64] *Klinedinst,* 2001 WL 1561821, at *9; *Adkins* 2001 WL 1561821, at *9; Prescott v. North Lake Christian School, 2001 WL 740506 (E.D. La. June 29, 2001); *Tupper,* 2001 WL 334500, at *8.

[65] *Tupper,* 2001 WL 374500 at *8.

[66] *MicroStrategy Inc.,* 268 F.3d at 251.

[67] *Adkins,* 2001 WL 1782607, at *5.

a jury of their peers but must present their claim to an individual called an arbitrator who serves a function similar to judge and jury. The clients may be told about a U.S. General Accounting Office study of arbitration in the securities industry which found that the discrimination claims handled by arbitrators differed from the usual types of disputes arbitrated before them because these claims (1) involved federal civil rights laws, not securities laws, (2) these arbitrators were not required to have training and knowledge of employment law, and (3) the majority of the arbitrators were white males over the age of 60.[68]

Plaintiff lawyers seek a forum that potentially provides the most favorable economic outcome of the controversy for their clients; and near universally their preference is a judicial forum before a jury rather than an arbitral forum. An arbitration agreement that is fundamentally unfair will be subject to challenge by attorneys seeking to avoid arbitration. In cases where the employer has "devised an arbitration agreement that functions as a thumb on [an employer's] side of the scale" in an employment dispute with an employee;[69] or where the arbitration agreement and employer actions "indicate a systematic effort to impose arbitration on an employee...as an inferior forum that works to the employer's advantage,"[70] the employer may well find that it will be unable to enforce the agreement to arbitrate under the FAA in court. Contrary to the perception that business may be attempting to "stack the deck" against claimant-employees, in reality most corporate boards and company executives devote significant human and economic resources to making sure that their companies are in full compliance with federal and state employment laws. A fair and just arbitration agreement will better serve the needs of employers than an unbalanced

[68] U. S. General Accounting Office, Employment Discrimination: How Registered Representatives Fare in Discrimination Disputes (1994). Articles listing the shortcomings of mandatory arbitration of discrimination disputes are Alleyene, *Statutory and Discrimination Claims: Rights Waived and Lost in the Arbitration Forum*, 1 HOFSTA Lab. L.J. 381-384 (1996). M. Bickner, et al.: *Developments in Employment Arbitration*, 52 DISP. RESOL. J. 8 (1997); J. Garrison, *The Employee's Perspective, Mandatory Binding Arbitration Constitutes Little More Than A Waiver of a Worker's Rights*, 52 DISP. RESOL. J. 15 (1997). Isbell, *Compulsory Arbitration of Employment Agreements: Beneficient Shield or Sword of Oppression?* Armendariz v. Foundation Health Psychcare Services, Inc., 22 WHITTIER L REV. 1107, 1142-1144 (2001).

Professor Samuel Estreicher has written an article entitled Predispute Agreements To Arbitrate Statutory Employment Claims, 72 N.Y.U.L. REV. 1344 (1997), in which he supports the position that a well-designed private arbitration alternative for statutory employment claims is in the public interest and is achievable. He asserts that the law should encourage, rather than hinder, arbitration of these disputes; and he defends the fitness of arbitrators for such responsibilities.

[69] *Circuit City II*, Daily Lab. Rep. No. 25 at E-1.

[70] Armandariz v. Foundation Healthcare Services, Inc. 24 Cal. 4th 83, 124 (2001).

arbitration agreement that is unenforceable in court under the FAA. The advantages to arbitration for both the employer and employees is that the matters at issue are resolved in an expeditious, timely, and just manner, before an expert on employment law, with lower overall costs and in a shorter period of time than litigation. The decision is final and binding on the parties, with a very limited review of the decision under Section 10 of the FAA. Should the employee be successful and the actions of the employer's agents be found to be contrary to employment law, the employer is informed of the decision much sooner than in litigation, and the employer can take appropriate corrective action in a more expeditious fashion. The remedies for the employee are the same as provided in a court and the process is a private one, and not a source of adverse publicity with loss of good will. Should the employee be unsuccessful in her or his claims, the controversy is resolved in a shorter period of time than litigation and the individual can move forward with her or his life, short of the years that are sometimes consumed in prolonged litigation.

An employer may set forth the evenhanded features of the arbitration agreement for the benefit of its employees in its Employees Handbook. Alternatively, the employer may incorporate the *National Rules for the Resolution of Employment Disputes*[71] of the American Arbitration Association, a non profit public service organization, or the rules of some other similar organization that serves as a tribunal administrator for employment disputes, as the basis of the arbitration agreement with its employees. A pre-dispute explanation of the neutral structure of the process and its advantages may improve the way in which employees view arbitration.

A "fair" arbitration agreement may address the following elements:

1. The claimant-employee must be involved in the selection of the arbitrator.
2. The arbitrator must be knowledgeable in employment law; and neutral, with no personal or financial interests in the result of the process.
3. The parties must have adequate discovery consistent with efficiency, economy and justice, as determined by the arbitrator.
4. The parties shall present their cases in the ordinary course of such proceedings, with rulings reserved to the arbitrator; and such rulings shall be in accordance with the *Gilmer* directives that the parties not forego their substantive rights.

[71] National Rules for the Resolution of Employment Disputes, effective January 1, 2001, American Arbitration Association, 335 Madison Avenue, NY 10017-4605.

5. The arbitrator must have the authority to provide the same statutory law and the same types of relief which would be available from a court, including attorneys fees and cost if such relief is afforded under the applicable statute.
6. The decision of the arbitrator shall be final and binding on the parties, with judicial review as limited in Section 10 of the FAA.[72]
7. The employer must make certain that claimant-employee shall not be precluded from effectively vindicating statutory rights in an arbitral forum because of arbitration costs. The *Green Tree* decision procedures will apply.

Fair and just arbitration agreements containing the elements discussed above benefit both the employers and employees, and provide expert, expeditious, and just resolution of the employment disputes now being channeled from the courts to arbitral forums under *Gilmer* and *Circuit City*.

[72] 9 U.S.C. § 10.